

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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75-6105

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United States Court of Appeals
FOR THE SECOND CIRCUIT

BATTERY STEAMSHIP CORP.,

Plaintiff-Appellant,
against

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL BY BATTERY STEAMSHIP CORP. FROM A DECISION
OF THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT
BATTERY STEAMSHIP CORP.

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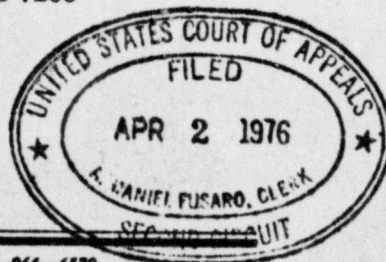


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Counter Statement of Facts

The introduction to the United States' brief at page 3 contains a statement to the effect that the fueling operation was conducted under the supervision of the ship's officers. The Record on Appeal does not contain any evidence to support this statement.

The evidence, however, does contain proof that MSTs employees exercised some control over the movements of the SS "ELWELL" in the fueling area. The only supervision, if it can be called that, by the ship's officers was that the officers intervened at the time the SS "ELWELL" was being damaged by the Oilbar No. 4. At that point, the vessel's officers threatened to cut the lines of the barge because of the damages being sustained to the vessel.

Under Article 16 of the charter party, Battery only reserved the right to specify the grade of the fuel to be supplied. It would appear that this would be a reasonable request as Battery's officers would know the characteristics of the vessel and the type of the fuel which should be consumed. This factor is not sufficient to support any contention that Battery was in charge of or in control of the operation.

The focus of this appeal should not be on the alternative methods of providing fuel for the SS "ELWELL" but rather the intention, and conversely, the responsibility of the United States, once it invoked the provision of Article 16, subdivision (c).

In the agreed statement of facts, the testimony of Battery's employees, namely, Messrs. Cederholm and Klyver support the proposition that the United States would be liable for the damages sustained to the vessel because of the acts of a third-party engaged by the United States to fuel the SS "ELWELL" (6a).

ARGUMENT

At page 3 of the United States' brief, counsel argues that Battery's reliance on *Fairmont Shipping Corp. v. Chevron International Oil Co., Inc.*, 511 F.2d 1252 (2nd Cir. 1975), is misplaced in that the holding of this decision does not change the principle that a party is not liable for the negligent acts of an independent contractor.

Fairmont, supra, was cited by Battery for the purpose of confirming that this Court had agreed with the theory that in a maritime service contract, there is an implied warranty that the work would be performed in a proper manner which obligation was owed by the contracting party even if, another had been engaged to perform on its behalf. Battery has therefore contended that the fueling of the SS "ELWELL" was not consistent with a workman-

like performance and that the United States was liable for the damages sustained.

In the footnote at page 1259 in *Fairmont*, Judge Smith stated that the obligation to perform in a workmanlike manner was owed by the contracting party as well as the subcontractor or agent of the contracting party. The Court thereupon cited its prior decision in *Todd Shipyard Corp. v. Moran Towing & Transportation, Inc.*, 247 F.2d 626 (2nd Cir. 1957).

A review of the facts in *Todd*, demonstrates its applicability and the similarity with the factual pattern in the instant appeal. In *Todd*, the evidence showed that Todd had hired a third party (Moran), to perform the towage and because of Moran's inability to perform, it (Moran) had engaged a third-party to carry out its contractual obligation and the third-party negligently performed.

The critical issue concerning Moran's liability for the damages sustained by the actions of the third-party was resolved by Judge Hincks in his opinion wherein he stated as follows:

"As to Moran's first contention, the law is clear. If Moran had been a mere broker or an agent of Todd for purposes of procuring a tugboat, then the only obligation upon Moran would have been that of exercising care in the selection of a tug and crew. Once having supplied a competent tug and crew Moran would not have been liable for their negligent acts. In this situation Moran would have had no control over the operation of S & H No. 2. The *Jungshoved*, 2 Cir., 290 F. 733.

On the other hand, if Moran had contracted with Todd to perform the task, then Sound and Harbor, Inc. was a subcontractor or agent of Moran, and Moran would be liable to Todd for the negligent performance of the contract. *Smith v. Booth*, 2 Cir., 122 F. 626."

Counsel for the United States has not distinguished the factual pattern in *Todd* in the present appeal. The arguments advanced by counsel are basically similar to those presented by Moran in attempting to avoid its liability, which arguments were overruled by this Court in *Todd*. Battery did not appoint the United States to act as its broker or agent for the purposes of procuring fuel for the vessel. Rather it was the United States who exercised its option to procure fuel for the SS "ELWELL" and instead of the United States using its own resources engaged Refineria, its agent or subcontractor, to carry out its commitment under Article 16, subdivision (c) of the charter party.

The evidence supports Battery's assertion that the refueling operation was negligently performed and under the circumstances, the United States must answer to Battery for the damages sustained. Of course, the United States was aware of this position by virtue of the fact it has commenced a separate action against Refineria for any damages which may be recovered by Battery.

CONCLUSION

The decision of the Court below dismissing the complaint should be reversed and judgment should be entered in favor of Battery to recover the damages sustained to the SS "Elwell".

Respectfully submitted,

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